

## Spain: The First Member State to Implement a Remuneration Right for Streaming

The Spanish system for equitable remuneration has been operating successfully since 2006 when the Law, which implemented the European Union Information Society Directive 2001 came into force. The Spanish law introduced an exclusive right for performers to make their recorded performance available to the public which is then presumed to be transferred from the performer to the phonogram producer or to the film producer as part of their contractual relation, preserving an unwaivable right to equitable remuneration: the remuneration right allows performers to be paid for the music and audiovisual works played in radio and TV broadcasts as well as in online music and audiovisual services, including streaming services and at the same time the producer retains the exclusive right to manage it with the users.

Therefore, in addition to the exclusive right so transferred, the performer retains an unwaivable right to equitable remuneration; i.e. they get paid for the use of their performance in an online music service but they cannot control the use (as they would have been with an exclusive right). This equitable remuneration has to be administered by the relevant national collective management organisation under European and Spanish legislation; anything else would be impractical for individual performers. Collective management organisations collect remuneration from users for, and distribute it to, their members, in this case individual performers.

Such unwaivable remuneration right for performers subject to collective management benefits all stakeholders:

- Online music services and VOD services / OTT platforms can be sure that they pay all performers and not just a few.
- Record companies and film producers retain their licences with platforms and their contracts with performers.
- Artists receive remuneration for their talent.

Equitable remuneration operates in parallel with the exclusive right transferred by contract; it does not interfere with the management of exclusive rights. It guarantees fair remuneration for performers who have transferred their exclusive rights in a full contract as well as for performers who have no such contract, e.g. session players or orchestra musicians.

The Spanish system managing equitable remuneration for performers is based, and complies with mandatory provisions in international copyright treaties (in particular the Rome Convention 1961, the WIPO Performances and Phonograms Treaty 1996 and the Beijing Treaty on Audiovisual Performances 2012) as well as the European Union Directives (specifically the amended Rental Directive 2006 and the Information Society Directive 2001). The recently adopted DSM Directive builds on the existing framework when mandating fair remuneration for performers in Article 18.

### Music performances / Musicians

The Spanish collective management organisation Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) collects these monies for the playing of music in broadcasts and music streams (including video on demand and subscription video on demand) from users (streaming services or record companies for annual supplementary remuneration for the making available right following



the 50th year after the phonogram entered the extended term of protection) on behalf of performers (musicians). AIE holds a comprehensive database of performers contributing to sound recordings; this enables them to distribute accurately to all performers. Only collective management organisations have such databases listing most performers on sound recordings; this is indispensable for an accurate distribution.

AIE and other international collective management organisations have developed a considerable database of performers in the last 20 years covering performances in recordings since the beginning of recorded music. More than 10 million of recordings are documented; the International Performers Database (IPD) currently has more than 1 million performers who are members of the 62 collective management organisations contributing to the IPD.

With the help of these databases, AIE has allocated digital revenues from equitable remuneration collected in Spain in 2018 to 52,265 performers (19,158 featured and 45,140 non-featured).. AIE regularly distributes the money to Spanish as well as international performers (based on bilateral agreements between collective management organisations).

AIE is granted by law the powers to negotiate the tariff for equitable remuneration with the users (online music services such as streaming services) on behalf of performers; it receives the money from users and distributes it to performers worldwide. Criteria for tariffs include the actual use of the repertoire within the activity of the user; the size of their repertoire used; the revenues of the user; the costs of their services provided by their collective management organisation) this is all compared with the terrace in other European Union territories.

#### Audiovisual Performances / Actors, dancers

The Spanish collective management organisation Artistas Intérpretes Entidad de Gestión de Derechos de Propiedad Intelectual (AISGE) collects the remuneration due to actors, dancers, dubbing actors and stage directors for the broadcasting and streaming (including video on demand and subscription video on demand) of their performances fixed in audiovisual recordings. This remuneration is paid by the users of such fixations (broadcasters, streaming services) in accordance to the tariff negotiated with AISGE taking into consideration the criteria laid down for this purpose in the Spanish Copyright Act. AISGE holds a comprehensive database of audiovisual recordings and performers, interacting with the two main international databases of works (VRDB, Virtual Recordings Database) and performers (IPD, International Performers Database), enabling an accurate, cost-efficient and transparent distribution of the collected remuneration to all performers.

More than 10 million recordings are documented within the VRDB, and the IPD currently has more than 1 million performers who are members of the 62 collective management organisations contributing to both databases.

With the help of these databases, in 2019 AISGE allocated digital revenues for more than 140.000 performers who participated in more than 130.000 audiovisual recordings. AISGE regularly distributes the money to all eligible performers, regardless of their nationality or place of residence.

As collective management organisations, both AIE and AISGE comply with the provisions of the European Union CRM Directive 2014:

- Transparency (to ensure fair and proportionate distribution of the remuneration monies)
- Good governance (to supervise the activities of collective management organisations)
- Accountability (to control monies collected and distributed)

AIE's data:

- 28.888 members at 31<sup>st</sup> December 2019
- 9 users

2019 regular national collection	33.705.517,54€
Communication to the public (Broadcasting/public performance phonograms)*	15.175.210,03€
Communication to the public (Broadcasting/public performance audiovisual recordings)	8.262.809,84€
Private copying phonograms	6.078.778,59€
Private copying audiovisual recordings	1.728.879,12€
Making available	2.459.839,96€

\* it should be noted that this figure includes the digital communication to the public from Spotify (around 1,2 million euros)

AISGE's data:

- On Dec. 31, 2019, AISE had 15.624 members (actors, dancers, dubbing actors, stage directors)
- In 2019 AISGE had collection agreements with 1.007 users of AV recordings (TV broadcasters, cable and/or satellite TV operators, OTTs and other AV streaming services, movie theatres, etc.)
- 2019 collection:

TV (broadcast and cable)	18.250.249,60 €
Private Copying	6.486.856,77 €
Movie Theaters	3.048.839,36 €
Streaming services	2.029.435,35 €
Other	3.169.085,14 €
Total	32.984.466,22 €

## **Annex: The relevant Spanish law - Article 108 Communication to the Public**

### **Summary**

Article 108.1 recognizes an exclusive right for performers for making their fixed performances available to the public

Article 108.2 establishes a presumption of transfer of this exclusive right in favour of the phonogram producer or audiovisual producer when both the performer and the producer enter into a contract in this regard.

Article 108.3 guarantees, when the performer has transferred the exclusive right to the producer, an unwaivable right to equitable remuneration. This right is subject to collective management, i.e., it cannot be managed by right holders individually but only by collective management organisations.

### **Wording (translated into English)**

1. The performer shall have the exclusive right to authorise the communication to the public:
  - a) Of his performances, except where any such performance constitutes in itself a performance transmitted by broadcasting or made from a previously authorised fixation;
  - b) In any case, of the fixations of his performances, by means of making available to the public in the manner laid down in Article 20.2.i); In both cases, such licence shall be granted in writing. If the communication to the public takes place by satellite or cable and in the manner provided for in Paragraphs (3) and (4) of Article 20 and relevant provisions of this Act, such provisions shall apply.
2. If the performer enters into contracts, either individually or collectively, with a phonogram or audiovisual recordings producer referring to the production of these it shall be assumed, except for agreement to the contrary in the contract and without prejudice to the unwaivable right to equitable remuneration to which the following Paragraph refers, that he has assigned his right to making available to the public to which Paragraph 1.b) refers.
3. If the performer has assigned or transferred to a phonogram or audiovisual recordings producer his right of making available to the public to which Paragraph 1.b) refers with reference to a phonogram or an original or a copy of an audiovisual recording, he shall preserve his unwaivable right to equitable remuneration to be received by whom makes it available to the public.
4. The users of a phonogram published for commercial purposes, or of a reproduction of such a phonogram that is used for any form of communication to the public, shall be under the obligation to pay a single amount of equitable remuneration to the performers and to the producers of phonograms, which shall be shared out between them. In the absence of agreement between them on such sharing, it shall be in equal parts. This payment obligation shall not be applicable in the case of making available to the public in the manner specified in Article 20.2.i), without prejudice to the provisions contained in Paragraph 3 of this Article.